Supreme Court, U.S.
FILED

962036 JUN 24 1997

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM WINSTON WAUGH,
Petitioner,

VS.

INTERNAL REVENUE SERVICE,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to resolve the conflict among the circuits relative to whether 11 U.S.C. §108(c) acts to apply the tolling provisions of 26 U.S.C. §6503(b) to 11 U.S.C. §507(a)(8)(A)(i).

2. Certiorari should be granted to determine whether the lower court has substantially departed from this Court's rules of statutory construction by employing legislative history to override any possible construction of the actual words of an unambiguous statute.

PARTIES TO THE PROCEEDING

Petitioner, Dr. William Winston Waugh, is a resident of Albert Lea, Minnesota. He was the Appellant in the proceeding before the Court of Appeals for the Eighth Circuit, the Appellant in the proceeding before the District Court for the District of Minnesota, and the Plaintiff in the adversary proceeding before the Bankruptcy Court for the District of Minnesota.

Respondent, Internal Revenue Service, is an administrative agency of the United States of America. It was the Respondent in the proceeding before the Court of Appeals for the Eighth Circuit, the Respondent in the proceeding before the District Court for the District of Minnesota, and the Defendant in the adversary proceeding before the Bankruptcy Court for the District of Minnesota.

There are no other parties to this action.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	3
Reasons for Granting the Writ	4
I. Certiorari should be granted to resolve the conflict among the circuits relative to whether 11 U.S.C. §108(c) acts to the tolling provisions of 26 U.S.C. §6503(b) to 11 U.S.C. §507(a)(8)(A)(i).	4
II. Certiorari should be granted to determine whether the lower court has substantially departed from this Court's rules of statutory construction by employing legislative history to override any possible construction of the actual words of an unambiguous statute.	10
Conclusion	11

APPENDIX

Appendix A—Opinion of the United States Court of Appeals for the Eighth Circuit filed on March 26, 1997 ..... A-1

Appendix B—Opinion of the United States District Court for the District of Minnesota filed on September 12, 1995 ..... A-11

Appendix C—Opinion of the United States Bankruptcy Court for the District of Minnesota filed on April 27, 1995 ..... A-28

TABLE OF CITATIONS

Page(s)

Cases Cited:

Caminetti v. United States, 242 U.S. 470, 485 (1917) 10

Haxen First State Bank v. Speight, 888 F.2d 574 (8th Cir. 1989) 6

In re Davis, 899 F.2d 1136 (11th Cir. 1990) 7

In re Taylor, 81 F.3rd 20 (3rd. Cir. 1996) 4

Montoya v. United States, 965 F.2d 554 (7th Cir. 1992) 4

Northern Pipeline Construction Company v. Marathon Pipe Line Company, 458 U.S. 50, 87 (1982) 6.8

Quenzer v. United States, 19 F.3d 163, 165 (5th Cir. 1993) 4,9

Rake v. Wade, 508 U.S. 464, 471 (1993) 10

United States v. Richards, 994 F.2d 763 (10th Cir. 1993) 4

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82 (1932) 10

West v. United States, 5 F.3d 423 (9th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994) 4

Statutes Cited:

11 U.S.C. §105 4

11 U.S.C. §108(c) 1,4,5,6,7, 8,9,10,11

11 U.S.C. §362 9

11 U.S.C. §507(a)(8)(A)(i) 2,3,4,5

11 U.S.C. §523(a)(1)(A) 5

11 U.S.C. §524 9

26 U.S.C. §6501 8

26 U.S.C. §6502 5,6,8,9

26 U.S.C. §6503(b) 2,4,5, 6,7,8,9

26 U.S.C. §6503(h) 6,8

Other Authority Cited:

S. Rep. No. 95-989 at 31 (1978), reprinted in 1978 U.S.Code Cong. and Admin. News 5787, 5816-17 7

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On March 26, 1997, the United States Court of Appeals for the Eighth Circuit issued its opinion [reported at 109 F.3d 489] affirming the decision of the District Court for the District of Minnesota issued on September 12, 1995 [reported at 95-2 U.S.T.C. ¶ 50,576] which, in turn, affirmed the decision of the Bankruptcy Court for the District of Minnesota issued on April 27, 1995 [reported at 1995 WL 464140].

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment of March 26, 1997. That judgment affirmed the District Court's affirmance of the Bankruptcy Court's grant of summary judgment to Respondent. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §108(c) provides:

§108 Extension of time.

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. §507(a)(8)(A)(i) provides:

§507(a) The following expenses and claims have priority in the following order:

* * *

(8) Eighth, allowed unsecured claims of governmental units; only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition.

26 U.S.C. §6503(b) provides:

§6503(b) Assets of Taxpayer In Control or Custody of Court.

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

STATEMENT OF THE CASE

Petitioner, Dr. William Waugh, filed a timely personal income tax return for the 1987 year on or before April 15, 1988. On July 1, 1988, Petitioner filed a Chapter 13 bankruptcy action in the Western District of Washington which was later converted to a Chapter 11 proceeding and ultimately dismissed on February 6, 1991. Thereafter, on May 9, 1991, Petitioner filed a Chapter 7 bankruptcy Petition in the District of Minnesota (his then residence) and received a general discharge on August 27, 1991.

On or about April 2, 1994, Petitioner received a refund of $11,019 for the 1993 tax year and, believing that his 1987 tax liability had been discharged, directed the Internal Revenue Service ("IRS") to apply said refund to his 1989 tax liability along with a cash payment of $847. However, the IRS disregarded Petitioner's instructions and applied the refund as well as the cash payment to Petitioner's 1987 liability. On June 8, 1994, the IRS served Petitioner with Notices of Intent to Levy upon his alleged outstanding 1987 and 1989 tax liabilities in the amounts (according to the IRS) of $157,631.36 and $15,620.52 respectively. Petitioner commenced an adversary proceeding in the bankruptcy court on September 9, 1994 seeking a declaratory judgment that his 1987 tax liability was discharged through his 1991 Chapter 7 action.

Pursuant to cross-motions for summary judgment, the bankruptcy court ruled that the three year priority period contained in Bankruptcy Code (11 U.S.C.) §507(a)(8)(A)(i) was suspended during the pendancy of Petitioner's 1988 bankruptcy action. This decision was subsequently affirmed by the District Court for the District of Minnesota as well as the Court of Appeals for the Eighth Circuit in a published opinion on March 26, 1997. The Bankruptcy Court for the District of Minnesota had jurisdiction over this matter in the first instance pursuant to 28 U.S.C. §1334.

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO WHETHER 11 U.S.C. §108(c) ACTS TO APPLY THE TOLLING PROVISIONS OF 26 U.S.C. §6503(b) TO 11 U.S.C. §507(a)(8)(A)(i).

There exists a conflict among the circuit as to whether Bankruptcy Code (Title 11 U.S.C.) §108(c) acts to apply the tolling provisions of Internal Revenue Code (Title 26 U.S.C.) §6503(b) to Bankruptcy Code §507(a)(8)(A)(i). The Courts of Appeal for the Third, Seventh, Ninth, and Eighth Circuits[1] have ruled in favor of Respondents' view of the matter—i.e., that Bankruptcy Code §108(c) *does* act to trigger the tolling provisions of Internal Revenue Code §6503(b) relative to Bankruptcy Code §507(a)(8)(A)(i). The Court of Appeals for the Fifth Circuit, in the case of *Quenzer v. United States*, 19 F.3d 163, 165 (5th Cir. 1993), has reached the opposite conclusion holding that the plain unambiguous language of Bankruptcy 108(c) limits its application to non-bankruptcy law and, therefore, it has no effect upon the priority provisions of Bankruptcy Code §507(a)(8)(A)(i). The Eighth Circuit, in the instant case, agreed with *Quenzer* that under the plain language of §108(c) it applies only to nonbankruptcy law[2]; but, inexplicably, reached a contrary result.

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[1] *In re Taylor*, 81 F.3rd 20 (3rd. Cir. 1996); *Montoya v. United States*, 965 F.2d 554 (7th Cir. 1992); *West v. United States*, 5 F.3d 423 (9th Cir. 1993); and the instant case of *Waugh v. United States*, 109 F.3d 489 (8th Cir. 1997). The Eighth Circuit in *Waugh* at footnote 8 erroneously cites *United States v. Richards*, 994 F.2d 763 (10th Cir. 1993) as supporting the position that Bankruptcy Code §108(c) acts to toll priority limitation periods contained in the Bankruptcy Code. The Tenth Circuit rested its finding solely upon the general equitable powers granted to bankruptcy courts under Bankruptcy Code Section 105(a).

[2] *Waugh*, 109 F.3d at 493.

Bankruptcy Code §507(a)(8) specifies the kinds of tax claims that are entitled to priority and, through incorporation by reference into Bankruptcy Code §523(a)(1)(A), excepts said tax claims from discharge. Bankruptcy Code §507(a)(8)(A)(i) grants priority status to certain tax claims a return for which was due (including extensions) less than three years prior to the bankruptcy petition date. Petitioner did not seek an extension for the filing of his 1987 federal income tax return; "[t]herefore, under normal circumstances, [his] tax liability for 1987 would become dischargeable on April 15, 1991."[3] Petitioner's underlying Chapter 7 bankruptcy petitioner herein was filed on May 9, 1991. Nonetheless, Respondent maintains, and the Eighth Circuit has found, that Respondent's tax claim for the 1987 year was **not** discharged in this bankruptcy.

Amazing as it may seem, four circuits have adopted the flawed reasoning (used to reach the result below) that is summarized as follows. Bankruptcy Code §108(c) extends any statute of limitations under "applicable *nonbankruptcy* law" which has not expired as of the bankruptcy petition date. Internal Revenue Code §6503(b) suspends the ten-year statute of limitations upon Internal Revenue Service ("IRS") collections after assessment found in IRC §6502 "for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States * * * and for 6 months thereafter." No court has ever found, nor could it be plausibly argued, that the plain meaning of either Bankruptcy Code §108(c) nor Internal Revenue Code §6503(b) in any way effects the operation of Bankruptcy Code §507(a)(8)(A)(i).

Behold the turning of water into wine, the alchemy transforming lead into gold— "nonbankruptcy law" really means "bankruptcy law". The Eighth Circuit (as well as the Third, Seventh,

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[3] *Waugh v. United States*, 76 A.F.T.R.2d ¶95-7059 (D.Minn. 1995) at page 95-5535.

and Ninth) has latched upon admittedly confusing language in the legislative history (quoted below) and concluded "Although the plain language of Section 108(c) states that it tolls priority periods only in nonbankruptcy cases, we conclude that Congress intended 11 U.S.C. §108(c) and 26 U.S.C. §6503(b) and (h) to toll the three-year priority period of 11 U.S.C. §507(a)(8)(A)(i)." *Waugh*, 109 F.3d at 493. The contradiction and straining by the Eighth Circuit and its companions in the majority apparently goes much further for the words "nonbankruptcy law" in §108(c) have been held to mean "nonbankruptcy law" relative to all parties except the IRS (for whom the same words mean "bankruptcy law"). See *Haxen First State Bank v. Speight*, 888 F.2d 574 (8th Cir. 1989).

The starting point, and key to this enigma, is a proper understanding of Internal Revenue Code Section 6503(b) which states—

> The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States * * * and for 6 months thereafter.

Question—does Internal Revenue Code Section 6503(b) act to toll the statute of limitations upon IRS collection found in Section 6502 while a taxpayer is in bankruptcy? There was considerable controversy regarding whether bankruptcy courts with their greatly expanded jurisdiction as constituted pursuant to the Bankruptcy Reform Act of 1978, P.L. 95-598 (prior to the 1984 amendments) were "courts of the United States." See *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 87 (1982)(plurality of Court held bankruptcy courts as constituted by Bankruptcy Reform Act of

1978 to be non-Article III adjuncts).[4] Interestingly, Bankruptcy Code §108(c) is also a creation of the Bankruptcy Reform Act of 1978.

Once it is acknowledged that bankruptcy courts could be construed *not* to be "courts of the United States"[5] under the 1978 Act, the meaning of the magical legislative history to Bankruptcy Code §108(c) takes on a different perspective.

> In the case of Federal Tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code). *The amendment applies this rule in a title 11 proceeding.* Accordingly, the statute of limitations on collection of a nondischargeable Federal Tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.

S. Rep. No. 95-989, at 31 (1978), reprinted in 1978 U.S. Code Cong. and Admin. News 5787, 5816-17[6] (emphasis added).

The heart of the confusion lies with the sentence—"The amendment applies this rule in a title 11 proceeding." ibid.[7] The

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[4] It should also be noted that in a Chapter 13 bankruptcy action, the debtor retains possession of his assets under Bankruptcy Code §1306(b); therefore, at least in the case of a Chapter 13 bankruptcy, the debtor's assets cannot be said to be in the "custody or control" of a court of the United States.

[5] See *In re Davis*, 899 F.2d 1136 (11th Cir. 1990).

[6] Bankruptcy Reform Act of 1978, P.L. 95-598.

[7] Whose author should be flogged round the fleet. See, Aubrey/Maturin series of novels by Patrick O'Brian for further details.

legion of courts which have relied upon these words have taken them to mean that Internal Revenue Code §6503(b)'s tolling provision applies to statutes of Title 11 (of which § 507 is but one). However, in light of the *Marathon* decision, one can see that any forward thinking committee member (or more likely their staff) would be concerned that the reforms contained in the 1978 Act could divest the Internal Revenue Service of the protection of Internal Revenue Code §6503(b) due to the changed nature of bankruptcy courts under 1978 Act. Therefore, a more likely reading of the above-quoted history is the following—regardless of whether bankruptcy courts are construed as "courts of the United States", Internal Revenue Code §6503(b) will be triggered to toll the statute of limitations upon IRS collections under Internal Revenue Code §6502 for the time period set forth in Bankruptcy Code §108(c).

That there was concern for tolling statute of limitations contained in the Internal Revenue Code during the pendancy of a bankruptcy case under the vast changes brought forth by the 1978 Act is reinforced by the passage 2 years later of Section 6(a) to the Bankruptcy Tax Act of 1980[8]. This provision added subsection (h) to Internal Revenue Code §6503 which is entitled "Cases under Title 11 of the United States Code".[9] Section 6503(h) extends the statute of limitations upon IRS assessments of tax liability (IRC §6501) as well as the limitations period upon IRS collections of assessments (IRC §6502) for the period

[8] P.L. 96-589.

[9] §6503(h) Cases Under Title 11 of the United States Code.—

> The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—
>
> (1) for assessment, 60 days thereafter, and
>
> (2) for collection, 6 months thereafter.

during which a taxpayer is protected by the automatic stay of Bankruptcy Code §362.

Let us assume for a moment that the Eighth Circuit has correctly interpreted the legislate history to the 1978 Act quoted above. Where are the words directing the reader that the priority periods contained in Bankruptcy Code §507 are to be extended? How can the provisions of Internal Revenue Code §6503(b) be "appl[ied]" to "Title 11"? *By its plain wording, Internal Revenue Code §6503(b) only extends the ten-year limitations period upon IRS collections contained in Section 6502.* Under the majority interpretation, is every limitations period placed upon the IRS in Title 11 to be extended by a prior bankruptcy through application of Bankruptcy Code §108(c) to Internal Revenue Code §6503(b)? The lack of clear direction in the legislative history which is the linchpin of the majority interpretation cannot be used to override the plain wording of Bankruptcy Code §108(c).

There is one additional problem with Respondent's (and, consequently, the Eighth Circuit's) construction of Bankruptcy Code §108(c) which begins "Except as provided in section 524 of this title". Bankruptcy Code §524 is entitled "Effects of Discharge". Thus, the introductory phrase to Bankruptcy Code §108(c) indicates that it does *not* apply to those debts that have been discharged during the bankruptcy proceeding. However, Respondent and the Eighth Circuit wish to use the provisions of §108(c) in determining whether or not there has been a discharge in the first place. This would result in circular logic which, again, was not intended by the drafters. The clear purpose of §108(c) was to toll nonbankruptcy statute of limitations. *Quenzer*, supra at 165.

CERTIORARI SHOULD BE GRANTED AS THE LOWER COURT HAS SUBSTANTIALLY DEPARTED FROM THIS COURT'S RULES OF STATUTORY CONSTRUCTION BY EMPLOYING LEGISLATIVE HISTORY TO OVERRIDE ANY POSSIBLE CONSTRUCTION OF THE ACTUAL WORDS OF AN UNAMBIGUOUS STATUTE.

The Court of Appeals for the Eighth Circuit below used the legislative history to Bankruptcy Code §108(c) to interpret the words "nonbankruptcy law" as meaning, for the IRS alone, "bankruptcy law". *Waugh*, 109 F.3d at 493.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, * * * the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Rake v. Wade*, 508 U.S. 464, 471 (1993).

No one has ever argued, no could they, that Bankruptcy Code §108(c) contains an ambiguity on its face. What the Eighth Circuit has done is to resort to legislative history to create an ambiguity in an otherwise clear statute. It is a well established principle in this Court that committee reports "cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. [citations omitted] Like other extrinsic aids to construction, their use is 'to solve', but not to create an ambiguity." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82 (1932).

CONCLUSION

The Court should grant certiorari herein to resolve a split in the circuits regarding the proper interpretation of Bankruptcy Code §108(c) and to reverse the Eighth Circuit's use of legislative history to create an ambiguity in an otherwise clear statute.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3928

In re: William Winston Waugh,
Debtor.

William Winston Waugh,
Plaintiff - Appellant,

v.

Internal Revenue Service,
Defendant-Appellee

Appeal from the United States District Court
for the District of Minnesota

Submitted: October 24, 1996

Filed: March 26, 1997

Before WOLLMAN, FLOYD R. GIBSON, and BEAM, Circuit Judges.

FLOYD R. GIBSON, Circuit Judge.

This appeal concerns the issue of whether the priority period of 11 U.S.C. §507(a)(8)(A)(i) (1994)[1], is suspended or tolled during the pendency of a Chapter 7 debtor's prior bankruptcy

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[1] Congress renumbered 11 U.S.C. §507(a)(7) to 11 U.S.C. §507(a)(8) in 1994. See The Bankruptcy Reform Act of 1994 §304, 11 U.S.C. §507(a)(8) (1994). The Bankruptcy Reform Act of 1994 does not apply to this case, which was commenced before the October 22, 1994 effective date. See The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 702, 108 Stat. 4106, 4150 (1994). However, because the change is not substantive, we refer to section 507(a)(8) throughout the opinion.

proceedings. We hold that it is and therefore affirm the district court judgment.

I. BACKGROUND

Appellant William Winston Waugh filed a tax return for the 1987 tax year by the April 15, 1988 deadline. However, Waugh failed to remit the tax due to the Internal Revenue Service (IRS). On July 1, 1988, Waugh filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. The court converted Waugh's Chapter 13 case to a Chapter 11 case on September 15, 1988. On July 27, 1990, the bankruptcy court revoked Waugh's Chapter 11 plan. Waugh appealed the revocation, but on February 6, 1991, the court finally dismissed his Chapter 11 plan. From July 1, 1988, until February 6, 1991, the automatic stay prevented the IRS from collecting Waugh's 1987 taxes. See 11 U.S.C. §362(a)(6) (1994).

Waugh filed a Chapter 7 bankruptcy petition on May 9, 1991, and received his discharge on August 27 of the same year. Waugh received a refund of $11,019 for the 1993 tax year, which he directed the IRS to apply to his 1989 tax liability along with a cash payment of $847. However, the IRS applied the refund and the cash payment to Waugh's outstanding 1987 tax liability. On June 8, 1994, the IRS served Waugh with Notices of Intent to Levy upon his outstanding 1987 and 1989 tax liabilities.[2] Waugh commenced an adversary proceeding on September 9, 1994, seeking a declaratory judgment that his 1987 tax liability was discharged in his Chapter 7 bankruptcy proceeding Waugh filed a motion for summary judgment claiming that his 1987 tax liability should have been discharged in his Chapter 7 bankruptcy proceeding because the priority period of section 507(a)(8)(A)(i) was not suspended during his prior bankruptcy

[2] The IRS claimed Waugh owed $157,631.36 for the 1987 tax year and $15,620.52 for the 1989 tax year.

cases. The IRS likewise filed a motion for summary judgment contending that because the automatic stay prohibited the IRS from collecting Waugh's 1987 tax during the prior bankruptcy proceedings, the priority period of section 507(a)(8)(A)(i) should have been suspended. The bankruptcy court[3] adopted the majority position on this issue and held that because the priority period of section 507(a)(8)(A)(i) was suspended during Waugh's prior bankruptcy proceedings, his 1987 tax liability was nondischargeable in his subsequent Chapter 7 proceeding. The district court[4] affirmed the bankruptcy court's decision, and Waugh appeals. For the reasons set forth below, we affirm.

II. DISCUSSION

This Court sits as a court of second review in bankruptcy cases and therefore applies the same standard of review as the district court. See *Southern Technical College, Inc. v. Hood*, 89 F.3d 1381, 1383 (8th Cir. 1996). We review the bankruptcy court's grant of summary judgment de novo. See id. Therefore, "[i]f the record shows that there is no genuine issue of material fact and that the prevailing party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment." Id. (citations omitted).

On appeal, Waugh contends that his 1987 tax liability was discharged in his Chapter 7 bankruptcy proceeding because the three-year priority period of 11 U.S.C. § 507(a)(8)(A)(i) (1994), and the three-year dischargeability period of 11 U.S.C. § 523(a)(1)(A) (1994), were not suspended or tolled during his prior bankruptcy proceedings. The IRS counters that Waugh's 1987 tax liability was not discharged in his Chapter 7 proceeding because 11 U.S.C. §108(c) (1994) and 26 U.S.C. §6503(b) and

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[3] The HONORABLE DENNIS D. O'BRIEN, Chief United States Bankruptcy Judge for the District of Minnesota.

[4] The HONORABLE RICHARD H. KYLE, United States District Judge for the District of Minnesota.

(h) (1994), operate to suspend the three-year priority period of section 507(a)(8)(A)(i) during the pendency of bankruptcy proceedings.

Ordinarily, in a Chapter 7 proceeding, calculating which tax debts are dischargeable is a relatively simple process. See 11 U.S.C. §§523(a)(1)(A), 507(a)(8)(A)(i) (1994). Section 523(a)(1)(A)[5] by reference to section 507(a)(8)(A)(i)[6], provides that taxes for which the return was due more than three years prior to a bankruptcy filing are dischargeable. Because Waugh's 1987 tax return was due April 15, 1988, Waugh's 1987 tax liability would have become dischargeable on April 15, 1991. Therefore, when Waugh filed his Chapter 7 bankruptcy petition on May 9, 1991, his 1987 tax liability could have been discharged. However, Waugh's previous bankruptcy filings com-

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[5] Section 523 provides in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed; . . . .

11 U.S.C. § 523(a)(1)(A) (1994).

[6] Section 507 provides in pertinent part:

> (a) The following expenses and claims have priority in the following order:
>
> * * *
>
> (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for-
>
> (A) a tax on or measured by income or gross receipts —
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; ... .

11 U.S.C. §507(a)(8)(A)(i) (1994).

plicate this usually simple calculation. The IRS contends that because the automatic stay prevented the IRS from collecting Waugh's 1987 taxes during his prior bankruptcy proceedings, see 11 U.S.C. §362(a)(6) (1994)[7] the priority period of section 507(a)(8)(A)(i) should have been tolled during those prior proceedings. We agree.

This case illustrates the competing interests Congress sought to balance when drafting the Bankruptcy Code:

> A three-way tension thus exists among (1) general creditors, who should not have the funds available for payment of debts exhausted by an excessive accumulation of taxes for past years; (2) the debtor, whose "fresh start" should likewise not be burdened with such an accumulation; and (3) the tax collector, who should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting.

S. Rep. No. 95-989, at 14 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5800. To satisfy the interests of the "tax collector," Congress extended a three-year priority period to tax collecting authorities. Id. Although a debtor is permitted to discharge tax debts which have grown "stale," Congress realized that "[a]n open-ended dischargeability policy would provide an opportunity for tax evasion through bankruptcy, by permitting discharge

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[7] We note that under the Bankruptcy Reform Act of 1994 §116, 11 U.S.C. § 362(b)(9) (1994), section 362(b)(9) was amended to "lift the automatic stay as it applies to a tax audit, a demand for tax returns, assessment of an uncontested tax liability, or the making of certain assessments of tax and issuance of a notice and demand for payment for such assessment." H.R. Rep. No. 103-835, at 43 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3352. The amendment, however, does not lift the automatic stay as it applies to the collection of taxes. See *Headrick v. Georgia (In re Headrick)*, 203 B.R. 805, 810 (Bankr. S.D. Ga. 1996). Therefore, if the 1994 amendment to section 362(a)(9) applied in this case, it would not alter our analysis of the automatic stay's effect on the priority period of section 507(a)(8).

of tax debts before a taxing authority has an opportunity to collect any taxes due." H.R. Rep. No. 95-595, at 190 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6150.

The Bankruptcy Code does not contain any provisions which explicitly suspend the priority period of section 507(a)(8)(A)(i) while a debtor is engaged in bankruptcy proceedings. However, section 108(c) provides as follows:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. §108(c) (1994). Subsections 6503(b) and (h) of the Internal Revenue Code provide:

> § 6503. Suspension of running of period of limitation
>
> * * *
>
> (b) Assets of taxpayer in control or custody of court—

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

* * *

(h) Cases under title 11 of the United States Code—

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and —

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

26 U.S.C. §6503(b),(h) (1994).

Waugh urges this Court to determine that because section 108(c) applies only to "nonbankruptcy law," the statute does not act to suspend the priority period of section 507(a)(8)(A)(i), which is itself part of the Bankruptcy Code. We recognize that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)(alteration in original)(quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); accord *Missouri v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.)*, 64 F.3d 1146, 1150 (8th Cir. 1995). However, we conclude that this is such a "rare case." If we applied the plain meaning of section 108(c) and held that the priority period of section 507(a)(8)(A)(i) is not

suspended during bankruptcy proceedings, Congress's intent to afford the IRS a three-year priority period for the collection of taxes certainly would be frustrated. Therefore, we conclude that the three-year priority period of section 507(a)(8)(A)(i) is suspended by 11 U.S.C. §108(c) and 26 U.S.C. §6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts.

The legislative history of 11 U.S.C. 108(c) supports the conclusion that Congress intended for section 108(c) and 26 U.S.C. §6503(b) and (h) to suspend the priority period of section 507(a)(8)(A)(i):

> In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code). The amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.

S. Rep. No. 95-989, at 31 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5816-17. Although the plain language of section 108(c) states that it tolls priority periods only in nonbankruptcy cases, we conclude that Congress intended 11 U.S.C. §108(c) and 26 U.S.C. § 6503(b) and (h) to toll the three-year priority period of 11 U.S.C. §507(a)(8)(A)(i). Therefore, because the automatic stay prevented the IRS from collecting Waugh's tax debt from July 1, 1988 until February 6, 1991, the three-year priority period of section 507(a)(8)(A)(i) was suspended during that time.

The majority of courts which have decided this issue have similarly determined that 11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h) operate to suspend the three-year priority period of 11 U.S.C. §507(a)(8)(A)(i).[8] Most recently, the Court of Appeals for the Third Circuit recognized that "[t]o limit §507(a) in this regard would lead to absurd results, as the government would lose its priority claim to back taxes as a result of the taxpayer's abuse of the bankruptcy process." *In re Taylor*, 81 F.3d 20, 23 (3d Cir. 1996). For example, in Waugh's case, the automatic stay prevented the IRS from collecting Waugh's 1987 taxes from July 1, 1988, until February 6, 1991. See 11 U.S.C. § 362(a)(6) (1994). Consequently, not even three months had passed from the time Waugh filed his tax return on April 15, 1988, until the IRS was stayed from collecting taxes on July 1, 1988. Were we to adopt Waugh's limited interpretation of 507(a)(8)(A)(i)'s priority period, future tax debtors could abuse the bankruptcy process by remaining tied up in bankruptcy

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[8] See *In re Taylor*, 81 F.3d 20, 24 (3d Cir. 1996); *Montoya v. United States (In re Montoya)*, 965 F.2d 554, 557 (7th Cir. 1992); *Brickley v. United States (In re Brickley)*, 70 B.R. 113, 115 (9th Cir. B.A.P. 1986); *Shedd v. United States (In re Shedd)*, 190 B.R. 692, 694 (Bankr. M.D. Fla. 1996); *In re Eysenbach*, 183 B.R. 365, 369 (W.D.N.Y. 1995); *Teeslink v. United States (In re Teeslink)*, 165 B.R. 708, 712-13 (Bankr. S.D. Ga. 1994); *In re Ross*, 130 B.R. 312, 313 (Bankr. D. Neb. 1991); *In re Wise*, 127 B.R. 20, 22 (Bankr. E.D. Ark. 1991); *Florence v. IRS (In re Florence)*, 115 B.R. 109, 112-13 (Bankr. S.D. Ohio 1990); cf. *West v. United States (In re West)*, 5 F.3d 423, 426 (9th Cir. 1993) (holding that 26 U.S.C. §6503, incorporated through 11 U.S.C. §108(c), operates to extend the priority period of 11 U.S.C. §507(a)(8)(A)(ii)), *cert. denied*, 511 U.S. 1081 (1994); *United States v. Richards (In re Richards)*, 994 F.2d 763, 765 (10th Cir. 1993) (holding that 11 U.S.C. §105(a), in addition to 26 U.S.C. § 6503 and 11 U.S.C. § 108(c), operates to extend the priority period of 11 U.S.C. § 507(a)(7)(A)(ii)). But see *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir. 1993)(holding that under the plain language of section 108(c) the statute does not suspend the priority period of section 507(a)(8)); *Clark v. IRS (In re Clark)*, 184 B.R. 728, 730-31 (Bankr. N.D. Tex. 1995) (same); *Gore v. United States (In re Gore)*, 182 B.R. 293, 300-01 (Bankr. N.D. Ala. 1995) (same).

proceedings until the three-year lookback period of section 507(a)(8)(A)(i) expired, then voluntarily dismissing the bankruptcy petition and refiling once the tax liability became dischargeable. We do not imply that Waugh had ill intentions when he filed his successive bankruptcy petitions. We merely use his case to illustrate how future bankruptcy petitioners could abuse the bankruptcy process if section 108(c) does not operate to suspend the priority period of section 507(a)(8)(A)(i). We determine that Congress did not intend to allow such an abuse of the bankruptcy process.

Waugh contends that the potential for abuse would be better dealt with on a case-by-case basis through the bankruptcy court's broad equitable powers under 11 U.S.C. §105(a) (1994). However, we conclude that such a case-by-case examination of a debtor's intent in filing successive bankruptcy petitions would be extremely burdensome. Furthermore, such an approach is unnecessary because 11 U.S.C. §108(c) and 26 U.S.C. §6503(b) and (h) operate to suspend the three-year priority period of section 507(a)(8)(A)(i).

III. CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICTCOURT
FOR DISTRICT OF MINNESOTA

Docket No. 3-95-507.
United States District Court, Dist. of Minnesota.

In re William W. WAUGH, Debtor.

WILLIAM W. WAUGH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

MEMORANDUM OPINION AND ORDER

Filed: September 12, 1995.

KYLE, District Judge.

INTRODUCTION

Before the Court is Appellant's appeal from an Order of the United States Bankruptcy Court.[1] The Order: 1) denied Appellant's motion for summary judgment and injunctive relief; and 2) granted Appellee's motion for summary judgment, finding that Appellant's 1987 tax liability was nondischargeable pursuant to 11 U.S.C. §523(a)(1) by reference to 11 U.S.C. §507(a)(8)(A)(i).

BACKGROUND

Appellant timely filed a personal income tax return for the tax year 1987 on or before the due date, April 15, 1988. 11 U.S.C.

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[1] The Honorable Dennis D. O'Brien, Chief United States Bankruptcy Judge.

§523(a)(1) does not allow the discharge of federal income tax liability until the running of the period which is provided for in 11 U.S.C. §507(a)(8)(A)(i)(formerly 507(a)(7)(A)(i)). Section 507(a) delineates priorities for the payment of certain expenses in bankruptcy, and subsection (8)(A)(i) sets the priority period for a tax on income or gross receipts at three years after payment of the tax is due. After this priority period lapses, the debt becomes "dischargeable," meaning that discharge by a bankruptcy court will relieve the debtor from meeting that obligation. Therefore, under normal circumstances, Appellant's tax liability for 1987 would become dischargeable on April 15, 1991. Appellant filed a bankruptcy petition under Chapter 7 on May 9, 1991, and received a general discharge on August 27, 1991.

The Internal Revenue Service, however, does not recognize the 1987 tax liability as having been discharged in 1991 because of an earlier bankruptcy filing by Appellant under Chapter 13 of the Bankruptcy Code July 1, 1988. This filing was converted to a Chapter 11 proceeding on September 15, 1988, and was revoked by order of the United States District Court for the Western District of Washington dated February 6, 1991. The Internal Revenue Service views the three-year calculation period in §507(a)(8)(A) as being suspended during the period of time that Appellant was involved in the first bankruptcy proceeding.

Following this interpretation, Appellee applied payments made to it by Appellant on April 2, 1994, to Appellant's 1987 tax liability, instead of toward his 1989 tax liability, as Appellant had directed.

On or about June 8, 1994, the Internal Revenue Service served upon Appellant a Notice of Intent to Levy concerning the outstanding portion of Appellant's 1987 tax liability. Also on or about June 8, 1994, Appellant received a second Notice of Intent to Levy concerning the outstanding portion of Appellant's 1989

tax liability. Appellant commenced an adversary proceeding in United States Bankruptcy Court for the District of Minnesota on September 9, 1994, seeking a declaratory judgment that his 1987 tax liability was discharged in the 1991 bankruptcy, as well as injunctive relief regarding the application of past payments and future collection efforts by the Internal Revenue Service. Both parties moved for summary judgment, and, after a hearing before the bankruptcy court on February 16, 1995, the court denied Appellant's motion and granted Appellee's motion for summary judgment. This appeal followed.

ANALYSIS

I. Standard of Decision

Conclusions of law made by a bankruptcy court are reviewed de novo. *In re Foust*, 52 F.3d 766, 768 (8th Cir. 1995); *In re Wagner*, 36 F.3d 766, 768 (8th Cir. 1994). In reviewing an order for summary judgment, the appellate court applies the same standard as the lower court. *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir. 1995). Summary judgment is to be granted under Rule 56 if it is shown that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); See *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511.

No material facts are in dispute concerning this appeal.

II. Plain Language

Appellant's primary argument rests upon a literal interpretation of the Bankruptcy Code. Appellant is clearly correct that the 1987 tax return was due more than three years before the filing of the Chapter 7 bankruptcy petition in May of 1991. Were the

Court to apply 11 U.S.C. §523(a)(1)(A)[2] and §507(a)(8)(A)[3] without regard to any other section of the Bankruptcy Code and in ignorance of the effect of this application, Appellant would prevail. As stated earlier, Section 507(a)(8)(A)(i)'s three-year priority period imposed on the pursuit of delinquent income taxes makes no mention of the effect of prior bankruptcy filings; Appellant argues that the three-year period continues to run throughout pending bankruptcy proceedings.

Yet Appellee contends that a broader view of the Bankruptcy Code is warranted. The three-year period, it is claimed, did not run during the approximately 1,080 days that Appellant's assets were protected by operation of 11 U.S.C. §362(a)(6), the Bankruptcy Court's automatic stay provision, during his Chapter 13/ Chapter 11 filing. This result is reached by reading 11 U.S.C.

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[2] Section 523(a)(1)(A) states:

(a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a custom duty—

(A) of the kind and for the periods specified in section 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed.

[3] Section 507(a)(8)(A) states, in setting banrkutpcy priorities:

(8) Eighth, allowed unsecured claims of governmental unites, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the due date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of filing of the petition;

(ii) assessed with 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

§108(c) together with 26 U.S.C. §§6502 and 6503. Section 108(c) suspends the statutes of limitation of certain nonbankruptcy actions when a debtor is involved in a bankruptcy proceeding.[4] 26 U.S.C. §6502 provides a ten-year (formerly six-year) limitation on the collection of taxes after an assessment by the Secretary of Revenue, and 26 U.S.C. §§6503(b)[5] and (h)[6] extend this ten-year collection period for the amount of time that the debtor is involved in bankruptcy proceedings. Section 6503 standing alone is not necessarily dispositive of this case, since, literally, it only extends to the 10-year period for collection in §6502 and the three-year period for tax assessment found in §6501. It does not, on its face, apply to the three-year limitations

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[4] The statute reads in pertinent part:

> If applicable *nonbankruptcy* law, an order entered in a *nonbankruptcy* proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period does not expire until ... the end of such period, including any suspension of such period on or after the commencement of the case.

11 U.S.C.§108(c)(1)(1994)(emphasis added).

[5] Section 6503(b) reads in pertinent part:

> (b) . . . The period of limitations of collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States, . . . and for 6 months thereafter.

[6] Section 6503(h) states:

> The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collection and -
>
> (1) for assessment, 60 days thereafter, and
>
> (2) for collection, 6 months thereafter.

period for the priority of income taxes in bankruptcy found in 11 U.S.C. §507(a)(8)(A)(i). Yet if §108(c) (the provision suspending time limits during nonbankruptcy actions) is interpreted to activate §6503, the period of "nondischargeability" concerning the tax obligation is prevented from running during the course of a debtor's bankruptcy case and for six months thereafter.

Appellant would like the Court to focus exclusively on the fact that, by its own terms, the suspension of time caused by §108(c) operates in the context of applicable *nonbankruptcy* law. Then, following the reasoning of the bankruptcy court in *In re Dietz*, 106 B.R. 236, 239 (Bankr. D. Colo. 1989), rev'd, 116 B.R. 792 (D. Colo. 1990), "[t]he measuring period specified by 11 U.S.C. §507(a)(7)(A) [now §507(a)(8)(A)] is clearly specified by applicable 'bankruptcy law' and is not affected by 11 U.S.C. §108(c)." This reasoning would then lead to the conclusion that, although the IRS would be barred from attempting to collect from the debtor by the §362 stay, the three-year priority/collection period would continue to run. Once the priority expires after three years, the debtor will be absolved of any responsibility to pay the tax if granted a general discharge.

Appellant would have done well to rely on *In re Gore*, 182 B.R. 293 (Bankr. N.D.Ala. 1995), an opinion that reaches Appellant's desired result and that has not been overruled.[7] That

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[7] The Gore decision and the very similar decision in *In re Turner*, 182 B.R. 317 (Bankr.N.D.Ala. 1995) by the same bankruptcy judge on the same date are the only ones that solidly support Appellant's position in the face of Appellee's argument. Since the opinions are almost identical, this opinion cites to the Gore decision only. The court relies on *In re Quenzer*, 19 F.3d 163 (5th Cir. 1993). The Quenzer opinion, while also finding that §108(c)'s suspension applies only to nonbankruptcy proceedings, neer once mentions §6503 or consideration of the legislative intent. The Quenzer court, importantly, state that "[a]bsent some other basis for tolling the section 507 time limit," it would not apply §108(c) to suspend the running of the time limit during the debtor's bankruptcy proceedings. 19 F.3d at 165. In the opinion

(Footnote 7 continued on next page)

bankruptcy court states: "The three year periods of sections 507(a)[(8)](A)(i) and 523(a)(7)(B) are bankruptcy law. Sections 108(c) and 6503(h) do not apply to bankruptcy laws." id. at 299. Thus, the debt is dischargeable because the three-year period is not suspended, and so Appellant wins.

This result, as shown below, is manifestly contrary to legislative intent and should not be reached.

III. Legislative Intent

More than twenty previous cases have avoided the myopic and out-of-context reading of the Bankruptcy Code that Appellant wishes this Court to accept.[8] Of course, blind adherence to

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(Footnote 7 continued)

of this Court, the proper basis is supplied by examining §108(c) in conjunction with §6503, and by considering the legislative intent behind the interaction of the Bankruptcy Code and the Internal Revenue Code, as supported by case law, proper interpretation, and clear indications of Congressional purpose. The Quenzer court was presented only with the argument that a bankruptcy court has the power to suspend the running of the time limit by virtue of its equitable powers, as laid out in 11 U.S.C. §105(a). This basis, while accepted by the Tenth Circuit in *In re Richards*, 994 F.2d 763, 765-66 (10th Cir. 1993) in embracing Appellee'ss position in this case, has not been argued by the parties and is not central to the case at bar.

[8] All of the following caes, whether submitted to the Court or found as a result of the Court's own research, are on point. Every case rejects Appellant's reading of the Bankruptcy Code, and embraces the position of Appellee. *In re West*, 5 F.2d 423, 426-27 (9th Cir. 1993), cert denied 114 S.Ct. 1830 (1994); *In re Montoya*, 965 F.2d 554, 555-58 (7th Cir. 1992); *In re Eysenbach*, 183 B.R. 365, 368-69 (W.D.N.Y. 1995); *In re Linder*, 139 B.R. 950, 952-53 (D.Colo. 1990); *In re Dietz*, 116 B.R. 792, 794 (D. Colo. 1990); *In re Molina*, 99 B.R. 792, 794 (S.D. Ohio 1988); *In re Brickley*, 70 B.R. 113, 115-16 (9th Cir. BAP 1986); *In re DiCamillo*, 1995 WL 526378 (Bankr.E.D.Pa. 1995); *In re Sirman*, 171 B.R. 403, 404 (Bankr.M.D. Fla. 1994); *In re Harris*, 167 B.R. 680, 682-83 (Bankr.M.D.Fla. 1994); *In re Teeslink*, 165 B.R. 708, 710-13 (Bankr. S.D.Ga. 1994); *In re Grogan*, 158 B.R. 197, 200-202

(Footnote 8 continued on next page)

precedent does not advance the cause of justice. Yet in this case, the position taken by these courts is the most rational course to follow.

Appellant is undoubtedly correct when he says that the starting point for this exercise in statutory interpretation is the language of the Code itself; only in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" may this Court go beyond the plain language of the Code. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1030 (1989)(quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S.

(Footnote 8 continued)

(Bankr.E.D.Cal. 1993); *In re Smith*, 165 B.R. 398, 400 & n.2 (Bankr. M.D.Pa. 1993); *In re Bowling*, 147 B.R. 383, 384-85 (Bankr.E.D.Va. 1992); *In re Ringdahl*, (1990-91) Bankr.L.Rep. (CCH) ¶ 74,082, 1991 WL 284105 (Bankr.M.D.Fla. 1991); *Matter of Ross*, 130 B.R. 312, 313-14 (Bankr.D.Neb. 1991); *In re Wise*, 127 B.R. 20, 21-23 (Bankr.E.D.Ark. 1991); *Matter of Stoll*, 132 B.R. 782, 784-85 (Bankr.N.D.Ga. 1990); *In re Bryant*, 120 B.R. 983, 984-85 (Bankr. E.D.Ark. 1990); *In re Davidson*, 120 B.R. 777, 781-87 (Bankr.N.J. 1990); *Matter of Florence*, 115 B.R. 109, 110-13 (Bankr. S.D.Ohio 1990); *In re Quinlan*, 107 B.R. 300, 301 (Bankr. D.Colo. 1989); *In re Ryan*, Case No. 88-B-07735-13, 1989 WL 155684 (Bankr. D.Colo. 1989).

The West case and a number of others in this list actually dealt with the priority period of what is now § 507(a)(8)(A)(ii), while the provision at issue here is § 507(a)(8)(A)(i). Appellant has not put forth an argument, and indeed no argument can be cogently made, tha the two subsections should be treated differently. See *In re West*, 5 F.3d at 427 n. 9.

Additionally, a Tenth Circuit case reaches the same result as those listed above, although it does not exactly uphold Appellee's argument, and instead relies on the equitable powers of the bankruptcy court under 11 U.S.C. § 105(a), and the sound public policy of ensuring that the government has enough thime to collect unpaid taxes. *In re Richards*, 994 F.2d 763, 765-66 (10th Cir. 1993). Richards in turn is relied upon by *Solito v. United States*, 172 B.R. 837, 840 (W.D.La. 1994) and *In re Brown*, 175 B.R. 766, 767-68 (Bankr.W.D.Okl. 1994)(reluctantly following Richards) in affirming a determination of nondischargeability.

564, 571, 102 S.Ct. 3245, 3250 (1982)). As many previous courts who have considered this question have recognized, this situation is just such a "rare case". E.g. *In re West*, 5 F.3d at 426 ("Because literal interpretation of §108(c) would frustrate the Bankruptcy Code's intricate scheme for the payment of tax claims, we do not adopt the debtors' 'plain language' admonitions.").

If Appellant's contentions were followed, a debtor could avoid paying delinquent income taxes by the following method: first, after the Internal Revenue Service notifies the debtor of the delinquency and its intention to collect, the debtor declares bankruptcy. Second, the debtor endeavors to lengthen the bankruptcy proceeding as much as possible, diminishing the still-running priority/collection period while being protected by the automatic stay of § 362. Finally, after the first bankruptcy filing was either revoked or withdrawn, the debtor could file for bankruptcy a second time, before the IRS could go through the proper procedures to collect the debt, but after the priority/ collection period has run completely. The debt would then be dischargeable, and the debtor could wholly avoid payment.

A number of other courts have noted the possibility for such abuse in this situation. See, e.g., *In re Molina*, 99 B.R. 792, 795 (S.D.Ohio 1988); *In re Florence*, 115 B.R. 109, 111 (Bankr.S.D.Ohio 1990)(Appellant's interpretation would create "impenetrable refuge for delinquent taxpayers"). Often quoted by courts is the rationale found in *In re Brickey*, 70 B.R. 113, 115 (9th Cir. BAP 1986): "To follow the Debtors' argument would render the extension of the statue of limitations in Section 108(c) without meaning, since tax collectibility is obviously useless if the tax debt has been discharged."

Appellant continues to adhere to the "plain language" argument, and advances the proposition that the IRS could utilize other methods of collection activity to collect the delinquent

taxes: for example, by converting the filing to a Chapter 7 filing, which would preserve the nondischargeable character of its claim. See *In re Eysenbach*, 170 B.R. 57, 60 (Bankr. W.D.N.Y. 1994), rev'd, 183 B.R. 365 (W.D.N.Y. 1995). In addition, Appellant points out that the bankruptcy court does possess considerable equitable powers, under 11 U.S.C. § 105, to curtail abuse.

While the government's ability to engage in legal maneuvering is not questioned, it is the intent of Congress, not the powers of the Internal Revenue Service in a bankruptcy proceeding, that is at issue. Regardless of whether the Service is able to take certain steps to enforce its right to collect in bankruptcy proceedings, the primary question must remain whether Congress intended that those steps be necessary. The question of intent hinges, in essence, on whether Congress primarily desired to give the Service a full three years to collect delinquent taxes, or whether Congress primarily desired to set "an hour when a man could finally divorce himself from his former holdings and debts." *In re Gore*, 182 B.R. at 313 (quoting United States v. Verlinsky, 459 F.2d 1085, 1088 (5th Cir. 1972)).

Appellant relies on *In re Deitz*, 106 B.R. 236, 239 (Bankr. D.Colo. 1989), rev'd 116 B.R. 792 (D.Colo. 1990), to assert that the three-year limitations period in § 507(a)(8)(A)(i) is merely a measure of time for which a priority will be given, and nothing more, thus favoring the debtor by discharging his income tax debts in a maximum of three years, without looking at other circumstances. The Gore court assets that the time provision, found in a provision of the Internal Revenue Code, should serve only to implement the "fresh start" policy of the Bankruptcy Code, 182 B.R. at 313—this argument seems especially strange when the same court has striven so forcefully to separate these two Codes in declaring that §108(c) (Bankruptcy) could not possibly implicate § 6503 (Internal Revenue).

The Court is persuaded by the following argument: the priority initially given to the IRS in §507(a)(8)(A)(i) is justified by "a Congressional desire to protect tax revenues and to prevent taxpayers from evading their tax debts in bankruptcy proceedings, but the time limit on this priority manifests Congress' right to a 'fresh start' even with respect to their tax debts." *Matter of Stoll*, 132 B.R. at 785. The Gore court focuses overmuch on one policy consideration to the exclusion of the overriding policy of allowing the Internal Revenue Service to collect taxes due. In the words of the Brickey court,

> [s]ince enforcement of the tax laws against delinquent tax debtors takes time, Congress, through section 523, intended to give the taxing authority at least three full years to pursue such debtors .... Congress did not intend to allow tax avoidance through bankruptcy by permitting the discharge of the debtor before the taxing authority has had a fair opportunity to collect taxes due.

70 B.R. at 115-15.

The Brickey court is not alone in its interpretation of the intent of Congress. See, e.g., *In re West*, 5 F.3d at 426-27; *In re Molina*, 99 B.R. at 795; *In re Wise*, 127 B.R. at 22-23; *In re Quinlan*, 107 B.R. at 300-01.

The conclusion reached by Stoll, Brickey, and other cases is amply supported by clearly worded segments of legislative history. First, the legislative history of the Bankruptcy Act specifically contemplates the necessity of preventing bankruptcy proceedings from interfering with the collection of delinquent taxes:

> It is believed that such a [3-year] period will not impose an unrealistic or unfair burden upon the tax authorities in auditing returns and assessing deficiencies .... *The fact that tax claims for the 3 years preceding bankruptcy will not be*

> *discharged should serve to discourage recourse to bankruptcy as a facile device for evading tax obligations.*

S. Rep. No. 1158, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S.C.C.A.N. 2468, 2470 (emphasis added). See also *In re Molina*, 99 B.R. at 794.

Moreover, and more importantly, the legislative history behind Section 108(c) militates directly against the improperly narrow reading suggested by Appellant. The section is "designed to minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings," S. Rep. No. 989, 95th Cong., 2d Sess. 14-15 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5800-01. This report on the Bankruptcy Reform Act of 1978 additionally implies in its summary that Congress believed Appellant's desired result would be fundamentally unfair, and would strike at the very legitimacy of the federal tax system:

> [T]he systems work[] to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenue thus lost must be shifted to other taxpayers.

Id. at 14, reprinted in 1978 U.S.C.C.A.N 5787 at 5800.

Finally, in most convincing language, the report goes on to state clearly the intended resolution of the question before this Court, espousing Appellee's view that §108(c) was meant to activate 26 U.S.C. §6503:

> In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control

> or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code). The Amendment applies this rule in a title 11 proceeding. Accordingly, *the statute of limitations on collection of a nondischargeable federal tax liability of a debtor will resume running after 6 months following the end of the period which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.*

Id. at 30-31, reprinted in 1978 U.S.C.C.A.N. 5787, 5816-17 (emphasis added). See also *In re West*, 5 F.3d at 427; *Matter of Stoll*, 132 B.R. at 785.

This Court agrees with the Gore court that §507(a)(8)(A) is properly seen as a "balancing act" between the rights of the IRS and the rights of a debtor. 182 B.R. at 312. The Ninth Circuit also recognizes the interplay between the Internal Revenue and Bankruptcy Codes in preserving the "Bankruptcy Code's intricate scheme for the payment of tax claims." *In re West*, 5 F.3d at 426. The recognition of the interaction undercuts any assertion that Sections 507 and 523 of the Bankruptcy Code cannot possibly be affected by Section 6503 of the Internal Revenue Code. The West court realized that Appellee's desired result is not consistent with a "holistic interpretation" of the Bankruptcy Code, especially given "the clearly expressed statutory purpose of providing the IRS with a specific period of time within which to collect taxes." 5 F.3d at 426 (citing *In re Florence*, 115 B.R. 109, 11 (Bankr. S.D. Ohio 1990)). Moreover, the West court notes, there is an established policy that 'limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government." Id.: *Badaracco v. Commissioner*, 464 U.S. 386, 392 (1983)(quoting *Lucia v. United States*, 474 F.2d 565, 570 (5th Cir. 1973)).

The Gore court perceptively notes that the issue of suspending time provisions does appear in §507(a)(8)(A) itself, but only in the context of the pendancy of a decision by the Internal Revenue Service on a debtor's "offer in compromise." 182 B.R. The Gore court reasons from Again, the question turns in part on the inclusion of this detailed suspension whether Congress intended to favor the debtor by giving the taxpayer an absolute provision in § 507 that Congress had in mind the nonbankruptcy tolling provision safe haven after three years, no matter of §108(c) when drafting 507, yet willfully "elected to provide the IRS with only a very narrow opportunity for the collection of taxes" by not making this suspension provision more extensive. Id. This Court is not at all persuaded to draw such a conclusion. The legislative history quoted by the Gore court demonstrates that Congress was clearly concentrating on an extremely particularized concern concern in drafting §507(a)(8)(A)(ii): the treatment of an offer by a financially troubled taxpayer to compromise on delinquent taxes. 182 B.R. at 302-03 (quoting H.R. Rep. No. 95-595, 95th Cong., 1St Sess. 1188-90 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6495-96; S, Rep. No. 95-989, 95th Cong., 2d Sess. 158-59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5856-57). There is no evidence in the Gore opinion of a conscious effort by Congress to deny the operation of any suspension provisions to the other periods of 507(a)(8)(A). This provision's influence on the interpretation of the Internal Revenue and Bankruptcy Codes must be minimal, when compared to the clearly worded intent of Congress and the schemes of the Bankruptcy and Internal Revenue Code as discussed above.

Finally, the Gore court advances an interesting argument that concerns the relationship between subsections (i), (ii), and (iii) of 507(a)(8)(A), and the interplay between procedural and substantive statutory language. The Gore court argues that subsection (iii) establishes a period of time for the assessment of taxes, subsection (ii) preserves a minimum time period of 240 days for the collection of taxes following assessment, and

subsection (I) establishes a maximum period for the collection of taxes before they become dischargeable. 182 B.R. 311. If §6503 rolled the time period in (i), it is asserted, this would circumvent the three-year limitation and render subsection (ii) and (iii) without effect.

Again, the question turns in part on whether Congress intended to favor the debtor by giving the taxpayer an absolute safe haven after three years, no matter what the circumstances, or whether Congress intended the I.R.S. to have an unhindered opportunity to collect taxes due. The purposes of the Bankruptcy and Internal Revenue Codes, the great weight of authority, and clearly worded indications of legislative intent demonstrate that the latter interpretation is the only reasonable position. To allow what may be unartful drafting to defeat the intent of Congress would be to reach a wrong result.

Also, subsections (ii) and (iii) retain their functions even if §6503 tolls the three-year limitation of priority period in (i)—the priority in subsection (ii) is determined from the date when the government unit assesses the tax, and the priority in subsection (i) is determined by the due date of the return. Subsection (iii), as the Gore court recognizes, provides a minimum amount of time for the assessment of taxes, but excludes some taxes (those with respect to which the debtor made a fraudulent return; for example) and provides that this period can be modified "by agreement." There is no language in (i) or (ii) that maintains that the limitation periods can be extended by agreement; similarly there is no language in (i) or (ii) that refers to other "applicable law". There exists no reason why the periods in (i) and (ii) cannot be tolled by §6503, since tolling odes not affect the scheme of Congress that means to allow the I.R.S. a number of different time measurements to establish this priority for delinquent taxes: one based on time of assessment (ii), one based on the amount of time that has passed since the time the tax was due (i), and one based on "assessability" under applicable law or by agreement

for certain taxes (iii). A tax, for example, may still be assessable under (iii), even if section 6503 tolls the three-year period and this extended period expires, if there exists a special assessment law for a certain type of tax measured by income or receipts, or if the taxpayer agrees to "assessability". All three subsections can have meaning if §6503 tolls the periods in §507—it shows that Congress meant to give the Internal Revenue Service more than one extremely restrictive time frame while pursuing the important goal of collecting delinquent taxes.[9]

Appellant's "plain language" argument cannot scale this mountain of well-considered precedent, legislative history, and simple common sense. It would operate to defeat the purpose of Congress. The proper result is that the filing of a bankruptcy petition suspends the running of the three-year collection period in determining tax claim priority status, pursuant to 11 U.S.C. § 507(a)(8)(A)(i). Therefore, Appellant's 1987 taxes are nondischargeable in the proceeding before this bankruptcy court.

---

[9] The Gore court also argues that §§ 507 and 523 are substantive, and should not have their definitions affected by §§ 108 and 6503, which are procedural. 182 B.R. at 303. The separation of Code sections into "substantive" and "procedural" is not likely to meet with success, especially in this context. We are dealing with tax priorities and time limitations on those priorities—if the time period (whether tolled or not tolled) runs out, the priorities cease to exist. Thses time periods can be seen as statutes of limitations; and it is not so long ago that debate raged over whether regular statutes of limitations were procedural or substantive, since under the Erie doctrine, the choice of whether to apply a state or a federal limitation by a federal court sitting in diversity often made the difference between enforceable claims into unenforceable claims. This Court feels that any attempt to make a determination of legislative itnent turns on the facile divison of law into procedural and substantive into dual, mutually exclusive spheres misses the mark, and encourages an improper solution.

Conclusion

Accordingly, for the foregoing reasons, it is Ordered that the judgment of the bankruptcy court be Affirmed.

Let judgment Be Entered Accordingly.

Dated: September 12, 1995

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF MINNESOTA

Bankruptcy No. 3-91-2628
Adv. No. 3-94-176

United States Bankruptcy Court,
D. Minnesota, Third Division

In re William W. WAUGH, Debtor.

WILLIAM W. WAUGH,
Plaintiff,

v.

INTERNAL REVENUE SERVICE,
Defendant.

ORDER FOR JUDGMENT

Filed: April 27, 1995

DENNIS D. O'BRIEN, Chief Judge.

This adversary proceeding to determine dischargeability of a tax debt, came on for hearing before the Court on cross-motions for summary judgment on February 16, 1995. Appearances were noted on the record. The Court, having considered the briefs, heard arguments of counsel, and otherwise being fully advised in the matter, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

STATEMENT OF THE CASE.

Income tax liability of a debtor, who has filed a return that was last due within three years prior to the filing of a bankruptcy case,

is nondischargeable under 11 U.S.C. § 523(a)(1), by reference to 11 U.S.C. § 507(a)(8)(i). In this case, the Debtor timely filed a return, due April 15, 1988, for the tax year 1987, but did not pay the tax. Ordinarily, the 1987 tax liability would have become dischargeable on April 15, 1991. The Debtor filed his Chapter 7 petition in May, 1991, and received his general Chapter 7 discharge in the ordinary course.

The Internal Revenue Service does not recognize the 1987 tax liability as having been discharged in the 1991 bankruptcy, and has applied tax payments that the Debtor submitted in full payment of a 1989 tax year liability, against the 1987 tax debt. The Debtor then commenced this adversary proceeding for declaratory judgment that his 1987 tax liability was discharged by his 1991 Chapter 7 discharge. He also seeks equitable relief regarding his 1989 tax liability; and, he seeks an injunction prohibiting the IRS from collecting either the 1987 or 1989 tax debt.

The IRS argues that a 1988 Chapter 13 bankruptcy case filed by the Debtor, later converted to Chapter 11, and finally dismissed in 1991 for failure to make plan payments, interrupted or tolled the three year calculation period that would otherwise have been applicable to dischargeability of the 1987 tax liability. The IRS claims that the three year nondischargeability period, rather than ending on April 15, 1991, actually extends far beyond May 9, 1991, when the Chapter 7 petition was filed. Finally, the IRS argues that it cannot be enjoined from levy on Debtor's property to satisfy the debts.

II.

FACTS.

The Debtor filed a Chapter 13 Bankruptcy case on July 1, 1988, which was later converted to a Chapter 11 case on September 15, 1988. His Chapter 11 plan was confirmed on

April 12, 1989. On July 27, 1990, the plan was revoked, due to his failure to make payments in accordance with the plan. He appealed the decision, but it was affirmed on February 6, 1991, and the case was finally dismissed.

On May 9, 1991, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code, and received his discharge on August 27, 1991. From July 1, 1988 through August 27, 1991, he was under the protection of the automatic stay for a total of 1080 days.

On April 2, 1994, the Debtor directed that his refund for the 1993 tax year, $11,019, plus $847 cash, be applied to pay off his 1989 tax liability of $11,858.22. Instead, the IRS applied both the 1993 tax refund and the cash payment offered by Debtor, to his 1987 outstanding tax liability.

On June 8, 1994, the IRS served upon the Debtor, its Notice of Intent to Levy, concerning his outstanding 1987 tax liability, in the amount of $157,631.36. On June 8, 1994, the Debtor received a second Notice of Intent to Levy for his outstanding 1989 tax year liability of $15,620.52.

The Debtor commenced this adversary proceeding on September 9, 1994, for declaratory judgment that the 1987 tax liability was discharged in the 1991 bankruptcy; and, for injunctive relief regarding the application of past payments and future collection efforts by the IRS. Both parties have now moved for Summary Judgment.

III.

DECISION.

Under 11 U.S.C. § 523(a)(1), by reference to 11 U.S.C. § 507(a)(8)(A)(i), an income tax obligation of a debtor who has filed a return is not dischargeable if the last date on which the return could have been timely filed falls within three years of the date of the filing of the bankruptcy petition. *In re: Brickley, 70*

B.R. 113, 114 (Bkr. 9th Cir.1986). Additionally, the tax obligation is a priority debt for distribution purposes; and, if the case be a case under Chapters 11, 12, or 13, the tax must be paid in full during a plan as a condition of confirmation. No one disagrees with this.

The problem arises out of serial filings. Typically, in serial filings, the earlier cases are filed under Chapters 11, 12, or 13; they involve the nondischargeable priority taxes; and, they fail. The failed cases are then followed by cases involving the same tax liability; but, the later cases are brought under Chapter 7, and they are filed outside the stated three year nondischargeability period. The issue in the later cases, as here, is whether the tax, now outside the stated three year nondischargeability period, is nonetheless nondischargeable, due to the earlier filings.

The issue is not associated with any specific inconsistency, conflict, or statutory ambiguity found in the Bankruptcy Code. Although unartfully drafted, the relevant Bankruptcy Code nondischargeability provisions, 11 U.S.C. §§ 523(a)(1) and 507(a)(8)(A)(i), are not apparently susceptible of different interpretations regarding their scope or coverage. They appear to simply identify, as nondischargeable, income tax liability of a debtor who has filed a return that is last due within three years prior to the filing of a bankruptcy case, without regard to earlier cases.

A literal reading and "plain meaning" approach to the Bankruptcy Code, seems to indicate that income tax liability of a debtor who has filed a return, which is last due more than three years before the filing of a bankruptcy case, is not covered by the nondischargeability provision of 11 U.S.C. § 523(a)(1); even where the same tax debt was involved in an earlier bankruptcy case as a nondischargeable tax liability falling within the three year period. Yet, every reported decision of final authority holds or indicates otherwise. See: *West v. United States (In re West),*

5 F.3d 423 (9th Cir.1993); *Richards v. United States*, 994 F.2d 763 (10th Cir.1993); *Montoya v. United States (In re Montoya)*, 965 F.2d 554, 555-58 (7th Cir.1992); *Linder v. United States (In re Linder)*, 139 B.R. 950, 952-53 (D.Colo.1992); *United States v. Deitz (In re Deitz)*, 116 B.R. 792, 794 (D.Colo.1990); *Molina*, 99 B.R. at 794-95; *Stoll v. IRS (In re Stoll)*, 132 B.R. 782, 784-85 (N.D.Ga.1990); In re Ross, 130 B.R. 312, 313-14 (D.Neb.1991); *In re Wise*, 127 B.R. 20, 21-23 (E.D.Ark.1991); *In re Ringdahl*, [1990-91] Bankr.L.Rep. (CCH) P 74,082, 1991 WL 284105 (Bkr.M.D.Fla.1991); *In re Bryant*, 120 B.R. 983, 984-85 (E.D.Ark.1990); *In re Davidson*, 120 B.R. 777, 781-87 (D.N.J.1990); *Florence*, 115 B.R. at 110-13; *In re Quinlan*, 107 B.R. 300, 301 (D.Colo.1989); *In re Ryan*, No. 88-B-07735-A, 1989 WL 155684 (Bankr.D.Colo.1989); *In re: Brickley*, 70 B.R. 113, 114 (Bkr. 9th Cir.1986).

These cases all hold that the running of the tax priority periods fixed in 11 U.S.C. § 507(a)(8)(A) are tolled during pendency of bankruptcy proceedings in which the IRS is stayed from collection efforts to secure payment of the tax. Since the nondischargeable tax identified in 11 U.S.C. § 523(a)(1) is the 11 U.S.C. § 507(a)(8) priority tax applicable to the proceeding, the running of the nondischargeability periods would necessarily be tolled as well, under the reasoning of the cases. Accordingly, under the cases, the "reach back" period for both 11 U.S.C. §§ 507(a)(8)(A) and 523(a)(1) priority and nondischargeable taxes in a bankruptcy proceeding is expanded in time equal to the lesser of: the pendency of an earlier bankruptcy proceeding in which the tax was priority and IRS collection efforts were stayed; or, the time of the priority period remaining when the earlier proceeding was commenced.

While many of the cases cited purport to base their holdings on statutory construction and plain meaning, the decisions are clearly driven by perceptions of Congressional intent, Bankruptcy Code purpose, and underlying public policy. Thus,

particularly in the earlier cases, the legal reasoning and analysis are strained. Nonetheless, this Court is persuaded that the decisions are correct. They also reflect a near universal agreement on the state of the law.

It would serve no purpose here to discuss in detail the principles of statutory construction; the intricacies and interplay among Bankruptcy Code and Internal Revenue Code provisions; or, the Congressional intent and underlying public policy that shape this result. These matters are thoroughly covered in the cases cited. This Court is especially persuaded by the discussion and reasoning of the court in *West v. United States*, 5 F.3d 423 (9th Cir.1993).

The Debtor's income tax liability for the 1987 taxes was not dischargeable in his May 9, 1991, Chapter 7 bankruptcy case. When he filed the Chapter 13 bankruptcy on July 1, 1988, the three year priority period that had begun on April 15, 1988, for the 1987 tax liability, was tolled. Running of the period did not resume until dismissal of the case on February 6, 1991. The liability was well within the 11 U.S.C. § 507(a)(8)(A) priority period, expanded as a result of the earlier bankruptcy proceeding, when the May 9, 1991, Chapter 7 case was filed. Therefore, the tax liability was nondischargeable under 11 U.S.C. § 523(a)(1), by reference to 11 U.S.C. § 507(a)(8).

Since the debt is nondischargeable, enforcement of the 11 U.S.C. § 524 injunction is not involved. There is no basis for this Court's entry of any injunctive relief in favor of the Debtor.[1]

---

[1] The Debtor seeks other injunctive relief on various grounds having nothing to do with the Bankruptcy Code or the bankruptcy proceedings. This Court has no jurisdiction over those matters. The Court lacks authority to consider, determine, or remedy any nonbankruptcy claims. See: *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); and 26 U.S.C. § 7421(a).

IV.

DISPOSITION.

Based on the foregoing, it is hereby ORDERED:

1) Plaintiff's motions for summary judgment and injunctive relief are denied.

2) Defendant's motion for summary judgment that William W. Waugh's federal income tax liability for the taxable year 1987, was excepted from discharge in his Bankruptcy Case No. 3-91-2628, is granted. William W. Waugh's federal income tax liability for the year 1987 is nondischargeable in Bankruptcy Case No. 3-91-2628, pursuant to 11 U.S.C. § 523(a)(1); and the debt was excepted from his general 11 U.S.C. § 727 discharge entered on August 27, 1991, in the case.

LET JUDGMENT BE ENTERED ON PARAGRAPH 2, ACCORDINGLY.

Supreme Court, U.S.
FILED
JUN 15 1997
CLERK

No. 96-2036

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM WINSTON WAUGH, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the three-year priority period established in Section 507(a)(8)(A)(i) of the Bankruptcy Code runs during the pendency of a bankruptcy proceeding.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Acosta v. *IRS*, 184 B.R. 544 (W.D. Tenn. 1995)	10
Bowling, In re, 147 B.R. 383 (Bankr. E.D. Va. 1992)	11
Brickley, In re, 70 B.R. 113 (Bankr. 9th Cir. 1986)	10
Bryant, In re, 120 B.R. 983 (Bankr. E.D. Ark. 1990)	11
Carter, In re, 74 B.R. 613 (Bankr. E.D. Pa. 1987)	11
Cowart, In re, 199 B.R. 799 (Bankr. M.D. Fla. 1996)	10
Darden, In re, 202 B.R. 715 (Bankr. E.D. Va. 1996)	10
Davidson, In re, 120 B.R. 777 (Bankr. D.N.J. 1990)	11
Deitz, In re, 116 B.R. 792 (D. Colo. 1990)	10
DiCamillo, In re, 186 B.R. 59 (Bankr. E.D. Pa. 1995)	10
Eysenbach, In re, 183 B.R. 365 (W.D.N.Y. 1995)	10
Florence, In re, 115 B.R. 109 (Bankr. S.D. Ohio 1990)	11
Gore, In re, 182 B.R. 293 (Bankr. N.D. Ala. 1995)	11
Harris, In re, 167 B.R. 680 (Bankr. M.D. Fla. 1994)	10
Jones, In re, 177 B.R. 541 (Bankr. N.D. Ohio 1994)	11
Linder, In re, 139 B.R. 950 (D. Colo. 1992)	10

Cases—Continued: Page

Macko, In re, 193 B.R. 72 (Bankr. M.D. Fla. 1996) .. 11
McMillan, In re, 204 B.R. 835 (Bankr. M.D. Ga. 1996) 10
Molina, In re, 99 B.R. 792 (S.D. Ohio 1988) 10
Montoya, In re, 965 F.2d 554 (7th Cir. 1992) 10, 11
Pastula, In re, 203 B.R. 941 (Bankr. M.D. Fla. 1996) 11
Pepper v. *Litton*, 308 U.S. 295 (1939) 7
Quenzer, In re, 19 F.3d 163 (5th Cir. 1993) 11, 12
Quinlan, In re, 107 B.R. 300 (Bankr. D. Colo. 1989) 11
Richards, In re, 994 F.2d 763 (10th Cir. 1993) 7, 8, 9, 10, 11, 12
Ringdahl, In re, Bankr. L. Rep. (CCH) ¶ 74,082 (Bankr. M.D. Fla. June 5, 1991) 11
Ross, In re, 130 B.R. 312 (Bankr. D. Neb. 1991) 11
Shabazz, In re, 206 B.R. 116 (Bankr. E.D. Va. 1996) 10
Shedd, In re, 190 B.R. 692 (Bankr. M.D. Fla. 1996) . 10
Solito v. *United States*, 172 B.R. 837 (W.D. La. 1994) 10
Stoll, In re, 132 B.R. 782 (Bankr. N.D. Ga. 1990) 11
Taylor, In re, 81 F.3d 20 (3d Cir. 1996) 10, 11
Teeslink, In re, 165 B.R. 708 (Bankr. S.D. Ga. 1994) 10-11
Tibaldo, In re, 187 B.R. 673 (Bankr. C.D. Cal. 1995) 10
Turner, In re, 182 B.R. 317 (1995), adhered to on reconsideration, 195 B.R. 476 (Bankr. N.D. Ala. 1996) 11
United States v. *Energy Resources Co.*, 495 U.S. 545 (1990) 7
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 7, 12
West, In re, 5 F.3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994) 10, 11

Cases—Continued: Page

West v. *United States*, 511 U.S. 1081 (1994) 13
Wise, In re, 127 B.R. 20 (Bankr. E.D. Ark. 1991) 11

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 1, 11 U.S.C. 101 *et seq*:
11 U.S.C. 105(a) 7, 11, 12
11 U.S.C. 108 12
11 U.S.C. 108(c) 6, 9, 11, 12
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 362 ..... 2, 8
11 U.S.C. 362(a)(6) 2
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 507 12
11 U.S.C. 507(a)(7)(A)(i) (1988) 3
11 U.S.C. 507(a)(8) 6
11 U.S.C. 507(a)(8)(A) 5, 10, 11, 12
11 U.S.C. 507(a)(8)(A)(i) 3, 4, 6, 7, 8
11 U.S.C. 523(a)(1)(A) 3
Ch. 7, 11 U.S.C. 701 *et seq.* 2, 3, 8
Ch. 11, 11 U.S.C. 1101 *et seq.* 2
Ch. 13, 11 U.S.C. 1301 *et seq.* 2, 8
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106:
§ 304(c)(2), 108 Stat. 4132 3
§ 702(b), 108 Stat. 4150 3
Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(a), 94 Stat. 3389 9
Internal Revenue Code (26 U.S.C.):
§ 6503 ..... 6, 11, 12
§ 6503(b) 8, 9
§ 6503(h) 6, 9

Miscellaneous:

S. Rep. No. 1158, 89th Cong., 2d Sess. (1966) 8
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 8, 9
S. Rep. No. 1035, 96th Cong., 2d Sess. (1980) 9

In the Supreme Court of the United States

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WILLIAM WINSTON WAUGH, PETITIONER

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 109 F.3d 489. The opinion of the district court (Pet. App. A11-A27) is unofficially reported at 76 A.F.T.R.2d 95-7059. The opinion of the bankruptcy court (Pet. App. A28-A34) is unofficially reported at 75 A.F.T.R.2d 95-2601.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1997. The petition for a writ of certiorari was filed on June 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On April 15, 1988, petitioner filed his federal income tax return for the taxable year 1987 but failed to pay the tax due. On July 1, 1988, petitioner filed a petition for relief under Chapter 13 of the Bankruptcy Code. The bankruptcy case was subsequently converted to proceedings under Chapter 11. The bankruptcy court initially confirmed petitioner's Chapter 11 plan but later revoked it (because petitioner failed to make child support and alimony payments in accordance with the plan) and dismissed petitioner's case. Petitioner appealed to the district court from the order of revocation and dismissal. Petitioner was granted a stay pending that appeal. From July 1, 1988 (the date that petitioner filed his petition) until February 6, 1991 (the date the district court affirmed the bankruptcy court's order dismissing the bankruptcy case), the government was prevented from taking any action to collect petitioner's 1987 tax liabilities by (i) the automatic stay provided by Section 362 of the Bankruptcy Code (11 U.S.C. 362(a)(6)), (ii) the provisions of the confirmed reorganization plan and (iii) the stay pending appeal from the order of dismissal. Pet. App. A2.

b. On May 9, 1991, petitioner filed a second petition for relief, this time under Chapter 7 of the Bankruptcy Code. Under the provisions of this Chapter, he was granted a discharge on August 27, 1991. Pet. App. A2.

2. On April 2, 1994, petitioner filed his income tax return for 1993. He directed that his income tax refund of $11,019 for that year, plus an additional cash payment of $847 that he remitted with his return, be applied by the Internal Revenue Service against his

outstanding 1989 tax liability. The Service, however, instead applied the 1993 tax refund and the cash remittance to petitioner's still unsatisfied 1987 tax liability. The Service also sent notices advising petitioner of the government's intent to levy on his assets to recover his remaining unpaid income tax liabilities for 1987 ($157,631.36) and 1989 ($15,620.52). Pet. App. A2.

3. In response to these notices of intent to levy, petitioner filed a complaint in bankruptcy court seeking a declaration that his 1987 tax liability had been discharged in his Chapter 7 case. Pet. App. A2-A3.

a. Under Sections 507(a)(8)(A)(i) and 523(a)(1)(A) of the Bankruptcy Code, an income tax obligation of a debtor is entitled to priority status and is not dischargeable if the last day on which the tax return could have been filed falls within three years of the date of the filing of the bankruptcy petition. 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A).[1] Petitioner asserted, however, that, because his 1987 tax return was due on April 15, 1988—a date *more* than three years prior to the filing of his Chapter 7 petition on May 9, 1991—his income tax liability for 1987 was not entitled to priority status in the Chapter 7 proceeding under Section 507(a)(8)(A)(i). If, as petitioner claimed, the tax liability was not entitled to priority status in the Chapter 7 proceeding, it would have been within the scope of the discharge that he received in that proceeding. Pet. App. A2.

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[1] Effective October 22, 1994, Section 507(a)(7)(A)(i) was renumbered Section 507(a)(8)(A)(i). Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 304(c)(2), 702(b), 108 Stat. 4132, 4150. The provision was otherwise unchanged. Consistent with the decisions below, we use the new section number throughout this brief.

The government contended, however, that the three-year priority period of Section 507(a)(8)(A)(i) was extended by the period of time that the government was prevented by petitioner's first bankruptcy case from collecting his 1987 taxes. The priority period therefore would not have expired before petitioner filed his second bankruptcy case, and those taxes therefore would not have been within the scope of the discharge received in that proceeding. Pet. App. A3.

b. The bankruptcy court agreed with the government's position. The court stated that a "literal reading and 'plain meaning' approach to the Bankruptcy Code, seems to indicate that [an] income tax liability of a debtor who has filed a return, which is last due more than three years before the filing of a bankruptcy case, is not covered by the nondischargeability provision of 11 U.S.C. § 523(a)(1); even where the same tax debt was involved in an earlier bankruptcy case as a nondischargeable tax liability falling within the three year period" (Pet. App. A31). The court noted, however, that nearly every reported decision holds that the "running of the tax priority periods fixed in 11 U.S.C. § 507(a)(8)(A) are [*sic*] tolled during pendency of bankruptcy proceedings in which the IRS is stayed from collection efforts to secure payment of the tax" (*id.* at A31-A32). The court concluded that these decisions, "clearly driven by perceptions of Congressional intent, Bankruptcy Code purpose, and underlying public policy," are correct and "reflect a near universal agreement on the state of the law" (*id.* at A32-A33). Applying the holdings of these cases to the facts in the present case, the court held that "[d]ebtor's income tax liability for the 1987

taxes was not dischargeable in his May 9, 1991, Chapter 7 bankruptcy case" (*id.* at A33).

4. The district court affirmed. The court stated that the literal terms of the applicable statutes do not suspend the running of the priority periods of Section 507(a)(8)(A) during a prior bankruptcy. The court held, however, that this was the "rare case" in which it was necessary to go beyond the literal language of the statutes (Pet. App. A19). The court explained that under a purely literal construction of the statute, debtors would be able to avoid tax obligations simply by dismissing their first bankruptcy petition after the priority periods of Section 507(a)(8)(A) expired and then filing a second petition shortly thereafter (Pet. App. A19). The court emphasized that, if the priority periods ran during a pending bankruptcy proceeding, the government would not be given the time periods to collect tax liabilities that Congress clearly sought to provide (*id.* at A21). The court noted that the legislative history of these provisions "militates directly against the improperly narrow reading suggested by [petitioner]" (*id.* at A22). Because petitioner's argument "would operate to defeat the purpose of Congress," the court concluded that "[t]he proper result is that the filing of a bankruptcy petition suspends the running of the three-year collection period in determining tax claim priority status, pursuant to 11 U.S.C. § 507(a)(8)(A)(i)" (*id.* at A26).

5. The court of appeals affirmed. The court acknowledged that the "Bankruptcy Code does not contain any provisions which explicitly suspend the priority period of section 507(a)(8)(A)(i) while a debtor is engaged in bankruptcy proceedings" (Pet. App. A6). After examining the structure and history of these

provisions, however, the court agreed with the district court that this was the "rare case" in which the plain meaning of legislation should not be applied in a manner that would frustrate the plain object of the statute to afford the government a three-year period for the collection of taxes (*id.* at A7-A8). The court therefore concluded that "the three-year priority period of section 507(a)(8)(A)(i) is suspended by 11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts" (*id.* at A8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 5-9) that the decision of the court of appeals unjustifiably disregards the language of Sections 108(c) and 507(a)(8)(A)(i) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code. Petitioner asserts (i) that Section 507(a)(8)(A)(i) is silent regarding any tolling of the three-year priority period during the pendency of a prior bankruptcy proceeding, (ii) that Section 108(c) of the Bankruptcy Code only extends nonbankruptcy law limitation periods, not the priority periods found in Section 507(a)(8), and (iii) that, while Section 6503(h) of the Internal Revenue Code suspends the statute of limitations for the assessment or collection of taxes when the government "is prohibited by reason of [a bankruptcy] case" from assessing or collecting taxes (26 U.S.C. 6503(h)), that statute does not expressly apply to the three-year priority period of Section 507(a)(8)(A)(i). Petitioner further claims that

this is not one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (*United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)).

As the Tenth Circuit concluded in *In re Richards*, 994 F.2d 763 (1993), however, these statutory provisions are not alone controlling. Authority to suspend the three-year priority period of Section 507(a)(8)(A)(i) can be found in a different statutory provision, Section 105(a) of the Bankruptcy Code. See 994 F.2d at 765. That Section provides bankruptcy courts with the authority to issue orders "necessary or appropriate to carry out the provisions of [the Bankruptcy Code,] * * * to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). Applying Section 105(a) in *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990), this Court noted the "traditional understanding" that bankruptcy courts are courts of equity. See also *Pepper* v. *Litton*, 308 U.S. 295, 303-304 (1939). The orders in this case—suspending the three-year priority period of Section 507(a)(8)(A)(i) during petitioner's first bankruptcy case—represent an appropriate application of this equitable power. See 994 F.2d at 765.

As the court of appeals explained (Pet. App. A9-A10), the suspension of the three-year priority period in this case fulfills the statutory design of providing a reasonable time for the government to collect taxes and preventing debtors from escaping liability by shielding their assets in repetitive bankruptcies. As a result of petitioner's first bankruptcy proceeding, the government was precluded from collecting petitioner's 1987 taxes (i) by the automatic stay provisions of Section 362, (ii) by the provisions of peti-

tioner's confirmed plan of reorganization, and (iii) by the stay that petitioner obtained pending his appeal from the order revoking his plan and dismissing his case. Instead of the three years that Congress contemplated in Section 507(a)(8)(A)(i) that the government would have for collecting taxes, petitioner's repetitive bankruptcy filings gave the government only 169 days to do so: (i) the period of 77 days from April 15, 1988, the date the 1987 return was due to be filed, to July 1, 1988, the date the Chapter 13 petition was filed, and (ii) the period of 92 days from February 6, 1991, the date the district court affirmed the bankruptcy court's order of revocation and dismissal, to May 9, 1991, the date the Chapter 7 petition was filed.

Suspending the priority period for collecting taxes under Section 507(a)(8)(A)(i) during petitioner's initial bankruptcy case was necessary to ensure that the government was not deprived of the full benefit of the three years that Congress granted for collection (Pet. App. A9-A10). Accord, *In re Richards*, 994 F.2d at 765; S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978) ("the tax collector * * * should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting"); S. Rep. No. 1158, 89th Cong., 2d Sess. 3 (1966) (excepting priority taxes from discharge would "discourage recourse to bankruptcy as a facile device for evading tax obligations").[2] As the court explained in *In re Richards*,

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[2] In several related provisions, Congress has evidenced its clear intent to afford the government an opportunity to collect taxes unimpeded by intervening bankruptcy cases. Section 6503(b) of the Internal Revenue Code was already in effect when the Bankruptcy Code was enacted in 1978. It suspends any limitations on the time in which the government may collect taxes during the period that the assets of the taxpayer

994 F.2d at 765, "use of the equitable authority in 11 U.S.C. § 105(a) [to deprive debtors of unintended benefits from repetitive bankruptcy filings] is not inconsistent with any specific provision of the Bankruptcy Code, and * * * is consistent with the underlying philosophy of the Bankruptcy Code."

The court of appeals was also correct in noting that acceptance of petitioner's contrary argument—under which the three-year priority period would continue to run during a prior bankruptcy proceeding—would facilitate schemes of tax avoidance (Pet. App. A10). A debtor could avoid paying his tax debt by filing a petition that stayed collection of taxes, then dismissing his bankruptcy petition after the three-year pri-

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are in the custody or control of any court. See 26 U.S.C. 6503(b). When the Bankruptcy Code was enacted, Congress specified that nonbankruptcy statutes of limitations (such as those contained in the Internal Revenue Code) are suspended until the automatic stay is lifted. 11 U.S.C. 108(c). This provision is intended to "minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings." S. Rep. No. 989, *supra*, at 14-15.

Shortly after the Bankruptcy Code was enacted, Congress added Section 6503(h) to the Internal Revenue Code. Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(a), 94 Stat. 3389. That Section specifically tolls the statute of limitations on assessment and collection of taxes while bankruptcy proceedings are pending. 26 U.S.C. 6503(h). "[I]f the * * * Internal Revenue Service is prohibited for a period of time by reason of a bankruptcy case from assessment or collection of tax (for example, because of the automatic stay under new 11 U.S. Code sec. 362(a)(6)), the running of the period of limitations is suspended, for assessment, for the prohibition period and for 60 days thereafter; and for collection, for the prohibition period and for six months thereafter." S. Rep. No. 1035, 96th Cong., 2d Sess. 50-51 (1980).

ority period expired and then (as petitioner did in this case) filing a new petition shortly thereafter. See also *In re West*, 5 F.3d 423, 426 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); *In re Montoya*, 965 F.2d 554, 556 (7th Cir. 1992). As the Third Circuit stated in *In re Taylor*, 81 F.3d 20, 25 (1996), Congress "did not intend to leave a loophole for debtors to engage in tax avoidance." See also *In re Molina*, 99 B.R. 792, 795 (S.D. Ohio 1988) ("Congress did not intend for a taxpayer to be able to escape liability by protecting his assets in a bankruptcy proceeding until the statute of limitations expired.").

2. a. For these reasons, the courts of appeals have (with only one, limited exception) consistently concluded that the priority periods set forth in Section 507(a)(8)(A) are suspended during the pendency of a prior bankruptcy proceeding. See Pet. App. A8-A9; *In re Taylor*, 81 F.3d at 25; *In re West*, 5 F.3d at 426; *In re Richards*, 994 F.2d at 765; *In re Montoya*, 965 F.2d at 556.[3] In reaching this conclusion, however, the courts have applied different analyses.

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[3] The lower courts have also generally agreed with this conclusion. See, *e.g.*, *Acosta* v. *IRS*, 184 B.R. 544, 547 (W.D. Tenn. 1995); *In re Eysenbach*, 183 B.R. 365, 368 (W.D.N.Y. 1995); *Solito* v. *United States*, 172 B.R. 837, 840 (W.D. La. 1994); *In re Linder*, 139 B.R. 950, 952-953 (D. Colo. 1992); *In re Deitz*, 116 B.R. 792, 794 (D. Colo. 1990); *In re Molina*, 99 B.R. 792, 795 (S.D. Ohio 1988); *In re Brickley*, 70 B.R. 113, 116 (Bankr. 9th Cir. 1986); *In re Shabazz*, 206 B.R. 116, 126 (Bankr. E.D. Va. 1996); *In re McMillan*, 204 B.R. 835, 837-838 (Bankr. M.D. Ga. 1996); *In re Darden*, 202 B.R. 715, 717 (Bankr. E.D. Va. 1996); *In re Cowart*, 199 B.R. 799, 800 (Bankr. M.D. Fla. 1996); *In re Shedd*, 190 B.R. 692, 694 (Bankr. M.D. Fla. 1996); *In re Tibaldo*, 187 B.R. 673, 676 (Bankr. C.D. Cal. 1995); *In re DiCamillo*, 186 B.R. 59, 62 (Bankr. E.D. Pa. 1995); *In re Harris*, 167 B.R. 680, 683 (Bankr. M.D. Fla. 1994); *In re*

Some courts, like the court of appeals in this case, have held that a proper basis for suspending the priority periods of Section 507(a)(8)(A) results from applying Section 108(c) of the Bankruptcy Code, in conjunction with Section 6503 of the Internal Revenue Code, to achieve the clear legislative intent to allow a three-year period unobstructed by any bankruptcy stay of collection. See, *e.g.*, *In re Taylor*, 81 F.3d at 22-24; *In re West*, 5 F.3d at 426-427; *In re Montoya*, 965 F.2d at 557-558. Other courts have relied more directly on the conclusion that the authority to suspend the priority period of Section 507(a)(8)(A) stems from the equitable powers of the bankruptcy court under Section 105(a) of the Bankruptcy Code. See, *e.g.*, *In re Richards*, 994 F.2d at 765; *In re Jones*, 177 B.R. 541, 543-544 (Bankr. N.D. Ohio 1994).

b. Contrary to petitioner's contention (Pet. 4), the decision in this case does not conflict with the decision of the Fifth Circuit in *In re Quenzer*, 19 F.3d 163 (1993). In that case, as here, the government did not

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Teeslink, 165 B.R. 708, 711-712 (Bankr. S.D. Ga. 1994); *In re Bowling*, 147 B.R. 383, 385 (Bankr. E.D. Va. 1992); *In re Ringdahl*, Bankr. L. Rep. (CCH) ¶ 74,082, at 99,718 (Bankr. M.D. Fla. June 5, 1991); *In re Stoll*, 132 B.R. 782, 785-786 (Bankr. N.D. Ga. 1990); *In re Ross*, 130 B.R. 312, 313 (Bankr. D. Neb. 1991); *In re Wise*, 127 B.R. 20, 23 (Bankr. E.D. Ark. 1991); *In re Bryant*, 120 B.R. 983, 985 (Bankr. E.D. Ark. 1990); *In re Davidson*, 120 B.R. 777, 787 (Bankr. D.N.J. 1990); *In re Florence*, 115 B.R. 109, 112-113 (Bankr. S.D. Ohio 1990); *In re Quinlan*, 107 B.R. 300, 301 (Bankr. D. Colo. 1989); *In re Carter*, 74 B.R. 613 (Bankr. E.D. Pa. 1987); contra *In re Pastula*, 203 B.R. 941, 945-948 (Bankr. E.D. Mich. 1997); *In re Macko*, 193 B.R. 72 (Bankr. M.D. Fla. 1996); *In re Turner*, 182 B.R. 317 (1995), adhered to on reconsideration, 195 B.R. 476 (Bankr. N.D. Ala. 1996); *In re Gore*, 182 B.R. 293, 298-299 (Bankr. N.D. Ala. 1995).

contend that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code tolled the priority periods of Section 507(a)(8)(A). The government contended instead that suspension of the priority period was a proper exercise of the court's authority under Section 105(a) of the Bankruptcy Code. The Fifth Circuit declined to consider that argument, however, because the government had not raised it in the lower courts. 19 F.3d at 165. Because the government had relied exclusively on Section 105(a) on that appeal, the Fifth Circuit merely adopted the government's concession that the literal terms of Sections 108, 507 and 6503 do not themselves compel the suspension of the priority period. *Ibid.*

The court in *Quenzer* therefore did not consider either of the arguments accepted by the various courts that have ruled in favor of the government on this issue. The court in *Quenzer* did not consider the argument, adopted by the court of appeals here, that this is the "rare case" in which "the intention of the drafters, rather than the strict language, controls" (*United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. at 242). Nor did the court in *Quenzer* address the argument adopted in decisions such as *Richards*, 994 F.2d at 765, that the priority periods of Section 507(a)(8)(A) may be suspended under Section 105(a) of the Bankruptcy Code. Instead, the court in *Quenzer* specifically declined to address that question because it had not been raised in the lower courts in that case. 19 F.3d at 165.

A conflict among the circuits thus does not exist on the proper disposition of the question presented in this case. On the issues actually litigated in this case, it cannot be said that the Fifth Circuit would

reach a different result than that reached by the several circuits that have addressed them. Thus, when the same alleged conflict between *Quenzer* and the decisions of the other circuits was raised as a basis for further review in *In re West*, *supra*, this Court denied the petition for a writ of certiorari. 511 U.S. 1081 (1994). Review by this Court is not warranted here for the same reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1997

(3)

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 96-2036

In The

Supreme Court of the United States

October Term, 1996

William Winston Waugh,

Petitioner,

vs.

Internal Revenue Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER IN REPLY

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6 pp

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Citations ii

Argument 1

Conclusion 3

TABLE OF CITATIONS

Cases Cited:

In re Richards, 994 F.2d 763, 765-66 (10th Cir. 1993) 2

Montoya v. United States, 965 F.2d 554 (7th Cir. 1992) 2

Quenzer v. United States, 19 F.3d 163, 165 (5th Cir. 1993) 1,2

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 2

Statutes Cited:

11 U.S.C. §105(a) 2

11 U.S.C. §108(c) 1,2

11 U.S.C. §507(a)(8)(A) 1,2

26 U.S.C. §6503 1,2

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BRIEF FOR THE PETITIONER IN REPLY

ARGUMENT

Respondent asserts on page 11 of its Brief in Opposition to petition for certiorari that "the decision in this case [i.e., the Eighth Circuit's decision below] does not conflict with the decision of the Fifth Circuit in In re Quenzer, 19 F.3d 163 (5th Cir. 1993)." Respondent stresses the following point to reach this curious conclusion--"the government [in Quenzer] did not contend that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code tolled the priority periods of Section 507(a)(8)(A)." (Resp. Br. at 11-12).

> In the district court the government successfully relied on the suspension provision in section 108(c) of the Bankruptcy Code as the basis for tolling the priority period for the collection of taxes during the prior bankruptcy proceedings. Under the plain language of section 108(c), however, that suspension applies only to nonbankruptcy law and nonbankruptcy proceedings. Absent some other basis for tolling the section 507 time limit, the Quenzers' tax liability for the years 1984 and 1985 must be discharged.

Quenzer, supra at 164.[1]

Nothing upon the face of the *Quenzer* opinion nor the record in this case supports Respondent's contention that it abandoned the argument upon which it won the *Waugh* case below--i.e., that 11 U.S.C. §108(c) and 26 U.S.C. §6503 together act to toll the priority periods in 11 U.S.C. §507(a)(8)(A) for the duration of prior bankruptcies. To the contrary, the *Quenzer* opinion clearly indicates that Respondent utilized said argument in the district court and that said argument was considered by the Fifth Circuit. Under any fair reading of the *Quenzer* and *Waugh* opinions, there is no question that the two conflict.

In straining to explain away the conflict apparent upon the face of the Fifth and Eighth Circuit opinions, Respondent states that it conceded in the Fifth Circuit case of Quenzer that the literal terms of Sections 108(c), 507 and 6503 do not themselves compel suspension of the priority period and went forward merely on the basis of the general equitable powers of bankruptcy courts under 11 U.S.C. §105(a). (Resp. Br. at 12). Why would Respondent abandon the argument upon which it had won in one prior circuit court[2] and the district below? The only logical conclusion is that Respondent believed the 11 U.S.C. §108(c) argument to be flawed.

This may explain why Respondent, after first setting forth the contentions of Petitioner herein, leads the "Argument" section of its brief with a lengthy discussion of the merits of 11 U.S.C. §105(a) as a ground for affirming the Eighth Circuit's decision below. It is unnecessary for Petitioner to reply to the merits of Respondent's Section 105(a) argument. As was the case in *Quenzer,* Respondent has failed to properly raise the Section 105 argument in the trial court. *Waugh v.* IRS, 76 A.F.T.R.2d 95-7059, footnote 8 (D.Minn. 1995)(Pet. App. A11, 17)--

This basis [i.e., 11 U.S.C. §105(a)], while accepted by the Tenth Circuit in *In re Richards,* 994 F.2d 763, 765-66 (10th Cir. 1993) in embracing Appellee's position in this case, **has not been argued by the parties and is not central to the case at bar.**

supra (emphasis added); See *Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992).

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[1] The Eighth Circuit clearly reached a contrary conclusion--

> Therefore, we conclude that the three-year priority period of section 507(a)(8)(i) is suspended by 11 U.S.C. §108(c) and 26 U.S.C. §6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts.

Waugh v. Internal Revenue Service, 109 F.3d 489 (8th Cir. 1996)(Pet. App. A8).

[2] *In re Montoya,* 965 F.2d 554 (7th Cir. 1992).

CONCLUSION

The Court should grant certiorari herein to resolve a split in the circuits regarding the proper interpretation of Bankruptcy Code §108(c) and to reverse the Eighth Circuit's use of legislative history to create an ambiguity in an otherwise clear statute.

Respectfully submitted,

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